

FCC MAIL SECTION

Federal Communications Commission

FCC 99-83

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Before the
Federal Communications Commission
DISPATCHED BY Washington, D.C. 20554

In the Matter of)
)
Amendment of the Commission's Rules) PR Docket No. 92-257
Concerning Maritime Communications) RM-7956, 8031, 8352

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1999

Released: May 3, 1999

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we address a petition¹ filed by Fred Daniel d/b/a Orion Telecom (Orion) seeking reconsideration of the *Third Report and Order and Memorandum Opinion and Order (Third Report and Order)* in this proceeding.² For the reasons discussed below, the petition for reconsideration is denied. In addition, on our own motion, we correct portions of the text and final rules in the *Third Report and Order*.

II. BACKGROUND

2. The Maritime Services provide for the unique distress, operational, and personal communications needs of vessels at sea and on inland waterways.³ Public coast stations are commercial mobile radio service providers that allow ships to send and receive messages and to interconnect with the public switched telephone network.⁴ In the *Second Further Notice of Proposed Rule Making* in this proceeding, the Commission proposed to convert the licensing of VHF (156-162 MHz) public coast stations from site-based licensing to a geographic area licensing scheme.⁵ The Commission tentatively concluded that such an approach would speed assignment of the remaining channels, reduce processing

¹ Orion Petition for Reconsideration (filed July 27, 1998) (Petition).

² Amendment of the Commission's Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order*, PR Docket No. 92-257, 13 FCC Rcd 19853 (1998) (*Third Report and Order*). Public notice of the petition was published in the *Federal Register* on September 18, 1998. See Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, 63 Fed. Reg. 49913 (Sept. 18, 1998); see also Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, *Public Notice*, Report No. 2296 (rel. Sept. 14, 1998). No comments were received.

³ *Third Report and Order*, 13 FCC Rcd at 19856.

⁴ *Id.*

⁵ Amendment of the Commission's Rules Concerning Maritime Communications, *Second Report and Order and Second Further Notice of Proposed Rule Making*, PR Docket No. 92-257, 12 FCC Rcd 16949, 16988-99 (1997) (*Second Further Notice*).

burdens, and facilitate the development of automated coastal systems.⁶ The Commission proposed to rely on the co-channel interference protection criteria governing site-based VHF public coast stations, which required a 12 dB ratio of desired-to-undesired signal strength within the service area of the incumbent licensee.⁷ In the *Third Report and Order*, released on July 9, 1998, we adopted the proposal to convert the licensing of VHF public coast stations to a geographic basis.⁸ No commenter, including Orion, addressed the level of co-channel interference that should be provided to VHF public coast stations, so we adopted the proposal to require geographic area licensees to afford each other and incumbent site-based licensees co-channel interference protection in accordance with the 12 dB standard.⁹

3. On July 27, 1998, Orion, an Automated Maritime Telecommunications System (AMTS)¹⁰ licensee, filed a petition for reconsideration of the *Third Report and Order*. Orion argues that the 12 dB co-channel interference standard is adequate to protect the operations of manually-operated public coast stations, but not to protect automated systems, the development of which will be facilitated by the rule changes adopted in the *Third Report and Order*.¹¹ It contends that automated stations are more vulnerable to co-channel interference than conventional stations because a human operator is more adept at distinguishing between desired and undesired signals.¹²

III. DISCUSSION

4. As an initial matter, a petition for reconsideration that relies on facts that were not previously presented to the Commission will be granted only when the facts arose or could not reasonably have been known to the petitioner until after his last opportunity to present them to the Commission, or the public interest requires the consideration of them.¹³ We note that Orion relies on facts not previously presented to the Commission. We further note that Orion has not indicated that such facts arose or could not reasonably have been known prior to our adoption of the *Third Report and Order*, particularly given that comment was specifically sought regarding co-channel interference protection.¹⁴ As a result, the only

⁶ *Id.*

⁷ *Id.* at 16989, 16993.

⁸ *Third Report and Order*, 13 FCC Rcd at 19859.

⁹ *Id.* at 19864, 19867.

¹⁰ An AMTS is a specialized system of public coast stations providing integrated and interconnected marine voice and data communications, somewhat like a cellular phone system, for tugs, barges, and other commercial vessels on waterways. AMTS stations are allocated spectrum in the 216-220 MHz band, separate from the marine VHF band. *Second Further Notice*, 12 FCC Rcd at 17004.

¹¹ Petition at 1-2.

¹² *Id.*

¹³ 47 C.F.R. § 1.429(b). *See generally* Amendment of Parts 1 and 21 of the Commission's Rules to Establish Procedures for Processing Mutually Exclusive Applications for Digital Termination Systems in the Digital Electronic Message Service, *Memorandum Opinion and Order*, CC Docket No. 85-40, 104 FCC 2d 836, 840 (1986).

¹⁴ *Second Further Notice*, 12 FCC Rcd at 16989-91.

basis upon which we could grant Orion's reconsideration petition is if the public interest requires consideration of these newly-presented facts.¹⁵ We find that the public interest requires reconsideration of these facts, and we will proceed with an analysis of Orion's reconsideration petition.

5. We are not persuaded that the 12 dB standard does not provide sufficient protection for automated stations. To date, the Commission has not distinguished between manual and automated stations for purposes of co-channel interference protection. Moreover, we do not believe that Orion's undocumented assertions constitute a sufficient basis for departing from this approach.¹⁶ In this connection, we note that Orion has not proposed an alternative to the 12 dB standard. We are concerned that adopting an overly conservative co-channel interference protection standard would be spectrally inefficient because it would prevent licensees from reusing spectrum in areas that could be served without harm to other licensees.¹⁷ The absence of complaints filed since the Commission authorized automated operation of public coast stations suggests that the 12 dB standard provides adequate co-channel interference protection, so we decline to modify it.¹⁸ Thus, we deny Orion's petition for reconsideration.

6. In addition, on our own motion, we correct the following portions of the text of the *Third Report and Order* to correct erroneous information, and we amend the following final rules in the *Third Report and Order* to conform to the text of the *Third Report and Order*.

- Footnote 127 of the *Third Report and Order* is revised to replace "FCC 98-3" with "FCC 98-25."
- The Final Regulatory Flexibility Analysis for the *Third Report and Order* is revised as set forth in the Appendix hereto in order to refer to "Form 601" instead of "Form 494 (common carrier)."
- In order to conform it to paragraph 53 of the *Third Report and Order*, Section 20.9 of the Commission's Rules is amended by revising paragraphs (b) and (b)(1) to include an omitted word ("VHF") to read as follows:

§ 20.9 Commercial mobile radio service.

* * * * *

(b) Licensees of a Personal Communications Service or applicants for a Personal Communications Service license, and VHF Public Coast Station geographic area licensees or applicants, proposing to use any Personal Communications Service or VHF Public Coast Station spectrum to offer service on a private mobile radio service basis must overcome the presumption that Personal

¹⁵ 47 C.F.R. § 1.429(b)(3).

¹⁶ See, e.g., Co-Channel Protection Criteria for Part 90, Subpart S Stations Operating Above 800 MHz, *Report and Order*, PR Docket No. 93-60, 8 FCC Rcd 7293, 7294 (1993) ("Good spectrum management, UTC claims, requires that the same interference criteria apply to all 800 MHz systems. We agree and therefore conclude that both SMR and non-SMR should be licensed in accordance with the 113 km (70 mi) standard that currently applies to SMR stations.").

¹⁷ *Id.*

¹⁸ See *Second Further Notice*, 12 FCC Rcd at 16959.

Communications Service and VHF Public Coast Stations are commercial mobile radio services.

(1) The applicant or licensee (who must file an application to modify its authorization) seeking authority to dedicate a portion of the spectrum for private mobile radio service, must include a certification that it will offer Personal Communications Service or VHF Public Coast Station service on a private mobile radio service basis. The certification must include a description of the proposed service sufficient to demonstrate that it is not within the definition of commercial mobile radio service in § 20.3 of this chapter. Any application requesting to use any Personal Communications Service or VHF Public Coast Station spectrum to offer service on a private mobile radio service basis will be placed on public notice by the Commission.

* * * * *

- In order to conform it to paragraph 17 of Appendix F of the *Third Report and Order*, which removed Section 90.283, Section 80.371 of the Commission's Rules is amended by removing footnote 4 of subsection (c)(1)(A).

- In order to conform it to paragraph 28 of the *Third Report and Order*, by clarifying that the rule applies to the co-channel interference protection due VHF public coast station geographic licensees, Section 80.751 of the Commission's Rules is amended to read as follows:

§ 80.751 Scope.

This subpart specifies receiver antenna terminal requirements in terms of power, and relates the power available at the receiver antenna terminals to transmitter power and antenna height and gain. It also sets forth the co-channel interference protection that VHF public coast station geographic area licensees must provide to incumbents and to other VHF public coast station geographic area licensees.

- In order to conform it to paragraph 28 of the *Third Report and Order*, by providing VHF public coast station geographic area licensees the co-channel interference protection set out therein, Section 80.773 of the Commission's Rules is amended by adding a new paragraph (c) to read as follows:

§ 80.773 Co-channel interference protection.

* * * * *

(c) VHF public coast station geographic area licensees are prohibited from exceeding a field strength of +5 dBu (decibels referenced to 1 microvolt per meter) at their service area boundaries, unless all the affected VHF public coast station geographic area licensees agree to the higher field strength.

IV. CONCLUSION AND ORDERING CLAUSES

7. For the reasons stated above, we deny Orion's petition for reconsideration of the *Third Report and Order*. Orion has not shown that the co-channel interference protection standard adopted in the *Third Report and Order* is inadequate. We also correct portions of the text and final rules in the *Third Report and Order* as set forth herein.

8. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, the Petition for Reconsideration filed by Fred Daniel d/b/a Orion

Telecom IS DENIED.

9. IT IS FURTHER ORDERED that, pursuant to the authority of Sections 4(i), 7(a), 303(b), 303(f), 303(g), 303(r), 307(e), 332(a), and 332(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 157(a), 303(b), 303(f), 303(g), 303(r), 307(e), 332(a), and 332(c), the *Third Report and Order and Memorandum Opinion and Order* in the above-captioned proceeding IS MODIFIED as set forth herein, and Parts 20 and 80 of the Commission's Rules, 47 C.F.R. Parts 20 and 80, ARE AMENDED as set out herein.

10. IT IS FURTHER ORDERED that this *Memorandum Opinion and Order* will be effective 30 days after publication in the Federal Register.

11. For further information contact Scot Stone, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, at (202) 418-0680.

12. Alternative formats (computer diskette, large print, audio cassette, and Braille) are available to persons with disabilities by contacting Martha Contee at (202) 418-0260, TTY (202) 418-2555, or via e-mail to mcontee@fcc.gov. This *Memorandum Opinion and Order* can be downloaded at <http://www.fcc.gov/Bureaus/Wireless/Orders/1999/fcc9983.txt>.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX - REVISED FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Second Further Notice of Proposed Rule Making* in this proceeding (*Second Further Notice*). The Commission sought written public comment on the proposals in the *Second Further Notice*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Need for, and Objectives of, the *Third Report and Order*

Our objective is to simplify our licensing process for VHF public coast stations. Specifically, this action will: (1) convert licensing of VHF public coast station spectrum from site-by-site licensing to geographic area licensing, (2) simplify and streamline the VHF public coast spectrum licensing procedures and rules, (3) increase licensee flexibility to provide communication services that are responsive to dynamic market demands, and (4) introduce market-based forces into the Maritime Services by using competitive bidding procedures (auctions) to resolve mutually exclusive applications for public coast spectrum. We find that these actions will increase the number and types of communications services available to the maritime community and improve the safety of life and property at sea, and that the potential benefits to the maritime community exceed any negative effects that may result from the promulgation of rules for this purpose. Thus, we conclude that the public interest is served by amending our rules as described above.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

No comments were submitted in response to the IRFA. In general comments on the *Second Further Notice*, however, some small business commenters raised issues that might affect small business entities. In particular, some small business commenters argued that geographic licensing should be used only in certain areas; or that incumbent licensees be permitted to expand their systems before any auctions are held; or that license areas should be small enough to permit smaller licensees to participate in auctions, so that small business do not have to bid for territory far exceeding their operating needs. The Commission carefully considered each of these comments in reaching the decision set forth herein.

C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

The rules adopted herein will apply to licensees using public coast spectrum. The Commission has not developed a definition of the term "small entity" specifically applicable to public coast station licensees. Therefore, the applicable definition of small entity is the definition under the Small Business Administration rules applicable to radiotelephone service providers. This definition provides that a small entity is any entity employing less than 1,500 persons. See 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812. Since the size data provided by the Small Business Administration does not enable us to make a meaningful estimate of the number of current or prospective public coast station licensees which are small businesses, and no commenters responded to our request for information regarding the number of small entities that use or are likely to use public coast spectrum, we used the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of Census, which is the most recent information available. This document shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. There are over 100 public coast station licensees. Based on the proposals contained herein, it is unlikely that more than 50 licensees will be authorized in the future. Therefore, for purposes of our evaluations and conclusions in this FRFA, we estimate that there are approximately 150 public coast station licensees which are small businesses, as that term is defined by the Small Business Administration.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

All small businesses that choose to participate in the competitive bidding for these services will be required to demonstrate that they meet the criteria set forth to qualify as small businesses, as required under Part 1, Subpart Q of the Commission's Rules, 47 C.F.R. Part 1, Subpart Q. Any small business applicant wishing to avail itself of small business provisions will need to make the general financial disclosures necessary to establish that the business is in fact small. Prior to auction each small business applicant will be required to submit an FCC Form 175, OMB Clearance Number 3060-0600. The estimated time for filling out an FCC Form 175 is 45 minutes. In addition to filing an FCC Form 175, each applicant will have to submit information regarding the ownership of the applicant, any joint venture arrangements or bidding consortia that the applicant has entered into, and financial information demonstrating that a business wishing to qualify for bidding credits is a small business. Applicants that do not have audited financial statements available will be permitted to certify to the validity of their financial showings. While many small businesses have chosen to employ attorneys prior to filing an application to participate in an auction, the rules are intended to enable a small business working with the information in a bidder information package to file an application on its own. When an applicant wins a license, it will be required to submit an FCC Form 601, which will require technical information regarding the applicant's proposals for providing service. This application will require information provided by an engineer who will have knowledge of the system's design.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The Commission in this proceeding has considered comments on ways to implement broad changes to the Maritime Services rules. In doing so, the Commission has adopted alternatives which minimize burdens placed on small entities. First, it has decided to establish a presumption that regional licensees are telecommunications carriers, avoiding the need for small telecommunications to provide detailed information about their operations. Also, it has exempted by rule from the Channel 16 safety watch requirement public coast stations whose areas are served by government stations, replacing the prior requirement that such coast stations individually request an exemption. In addition, the Commission has eased the construction requirements for VHF public coast stations.

The Commission considered and rejected several significant alternatives. It rejected the alternative of licensing all VHF public coast spectrum by Coast Guard District. Instead, it will license such spectrum in areas removed from major waterways by inland VHF Public Coast Station Area (VPCs), identical to Economic Areas (EAs), allowing small entities there to participate in the auction without bidding for territory far exceeding their operating needs. The Commission rejected the alternative of delaying the auctions for the inland VPCs by holding frequencies open for public safety applications. Instead, the Commission designated public safety channels in advance. The Commission rejected the alternative of requiring each geographic area licensee to provide detailed information about the services it will offer, so the Commission could determine whether the licensee is a telecommunications carrier. Instead, the Commission established a rebuttable presumption that geographic area licensees are telecommunications carriers, so only those seeking to avoid that classification need submit such information.

The Commission will send a copy of the *Third Report and Order and Memorandum Opinion and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Third Report and Order and Memorandum Opinion and Order* to the Chief Counsel for Advocacy of the Small Business. A copy of the *Third Report and Order and Memorandum Opinion and Order* and FRFA (or summaries thereof) will be published in the Federal Register. See 5 U.S.C. § 604(b).